

BEFORE THE TAX COMMISSION OF THE STATE OF IDAHO

In the Matter of the Protest of)	
)	DOCKET NO. 16917
[REDACTED])	
)	DECISION
Petitioner.)	
_____)	

On July 24, 2002, staff of the Sales, Use and Miscellaneous Tax Audit Bureau (Bureau) of the Idaho State Tax Commission (Commission) issued a Notice of Deficiency Determination to [Redacted]. (taxpayer). The Notice proposed additional sales tax, use tax, penalty and interest in the total amount of \$106,583 for the period January 1, 1999 through December 31, 2001. The taxpayer filed a timely appeal and petition for redetermination on September 23, 2002. An informal conference was requested and held on January 6, 2003. The Commission has reviewed the file, is advised of its contents, and hereby issues its decision modifying in part and affirming in part the deficiency determination.

DISCUSSION OF FACTS

The taxpayer is an Idaho-based retailer and real property contractor located in southeast Idaho. Its primary business is improving public roadways and selling gravel at retail. Other activities include site, utility, driveway, environmental, wildlife and conservation construction, as well as animal waste management services. The taxpayer has been registered with Idaho as a retailer since 1965 and has never been audited for sales and use tax by the Commission prior to the present. An audit of the company revealed untaxed use of gravel, oil and miscellaneous road building materials provided by highway districts for the repair of roadways. Although there were other audit findings, this was the sole issue of the protest.

The taxpayer's petition for redetermination states:

Our predominant business is assisting rural highway district and city agencies with their road and street maintenance needs. We provide a technical service of mixing an individual agency's gravel and liquid oil materials into a workable asphalt blend for their individual use, using a portable mixing device called a pugmill. We do not own the materials we mix, nor do we have any management control of the materials before or after we arrive. We are simply a service company hired to blend the materials for agency use.

The auditor, however, found that contracts between the road districts and the taxpayer specify that the taxpayer is responsible for mixing and then applying materials to the road surfaces.

ANALYSIS AND CONCLUSIONS

Under the Idaho Sales Tax Act, contractors improving real property are defined as the consumers of the materials they use.

63-3609. Retail sale -- Sale at retail. -- The terms "retail sale" or "sale at retail" means a sale for any purpose other than resale in the regular course of business or lease or rental of property in the regular course of business where such rental or lease is taxable under section 63-3612(h), Idaho Code.

(a) All persons engaged in constructing, altering, repairing or improving real estate, are consumers of the material used by them; all sales to or use by such persons of tangible personal property are taxable whether or not such persons intend resale of the improved property.

(b) For the purpose of this chapter, the sale or purchase of personal property incidental to the sale of real property or used mobile homes is deemed a sale of real property (emphasis added).

Further, the Idaho Sales Tax Act defines the word "use" as employed in the statement highlighted above, "...consumers of the material used by them."

63-3615. Storage -- Use. -- (a) The term "storage" includes any keeping or retention in this state for any purpose except sale in the regular course of business or subsequent use solely outside this state of tangible personal property purchased from a retailer.

(b) The term "use" includes the exercise of any right or power over tangible personal property incident to the ownership or the leasing of that property or the exercise of any right or power over tangible personal property by any person in the performance of a contract, or to fulfill contract or subcontract obligations, whether the title of such

property be in the subcontractor, contractor, contractee, subcontractee, or any other person, or whether the titleholder of such property would be subject to the sales or use tax, unless such property would be exempt to the titleholder under section 63-3622D, Idaho Code, except that the term "use" does not include the sale of that property in the regular course of business.

(c) "Storage" and "use" do not include the keeping, retaining, or exercising of any right or power over tangible personal property for the purpose of subsequently transporting it outside the state for use thereafter solely outside the state, or for the purpose of being processed, fabricated, or manufactured into, attached to, or incorporated into other tangible personal property to be transported outside the state, and thereafter used solely outside the state (emphasis added).

Finally, the Idaho Sales Tax Act emphasizes the requirement that tax is due on the contractor's use of building materials in performance of real property improvements for governmental agencies and political subdivisions that provide such materials.

63-3622O. Exempt private and public organizations. -- (1) There are exempted from the taxes imposed by this chapter:

(f) Sales to or purchases by the state of Idaho and its agencies and its political subdivisions

(4) The exemptions granted by subsection (1) of this section do not include the use of tangible personal property by a contractor used to improve real property of an exempt entity when such use is within the definition provided by section 63-3615(b), Idaho Code, whether the use tax liability is included in a contract total or stated separately in a contract (excerpted in pertinent part, emphasis added).

From the facts available to the Commission it appears the taxpayer is a contractor improving real property with respect to the materials in question and that it owes tax on the use of those materials. The taxpayer's position is that it supervises road building, making extensive use of highway district personnel and their vehicles in transporting and applying the paving materials.

The taxpayer acknowledged using road-building equipment known as a "laydown" machine that pours, applies and smoothes the surface material. The taxpayer's employees operate the laydown machine. The taxpayer stated at the hearing that the machine is used on from 50 to 75% of

its highway work. It is reasonable to assume from these facts that the taxpayer has been exercising right or power of control of the paving materials pursuant to road building contracts, which is within the definition of use found in Idaho Code § 63-3615(b).

The taxpayer has not provided any copies of its contracts during the appeals process that would indicate it was merely providing supervisory services and not actually performing construction work. The Commission also asked to see those contracts where a laydown machine was not used, and contracts where a highway district employee used a laydown machine as evidence that an alternate conclusion could be drawn. These contracts were not provided. Therefore, the deficiency is presumed to be correct and the burden is on the taxpayer to show that the deficiency is erroneous. *Parsons v. Idaho State Tax Commission*, 110 Idaho 572, 574-575 n.2 (Ct. App. 1986). The taxpayer has not met this burden.

In its petition for redetermination, the taxpayer states that the auditor's interpretation of sales tax law relative to real property improvement places an undue financial hardship on rural public agencies by imposing a tax on the use of all road-building materials by its employees. Although the taxpayer is required to pay a use tax on items it uses in real property improvements, there is no such requirement for public agencies using their own employees. Governmental organizations are exempt from paying sales or use taxes (Idaho Code §63-3622O(2)(j)). Whenever tax is due, it is never the legal responsibility of the governmental agency.

The taxpayer claims to have never been told of its responsibility with respect to the issue addressed in this decision. In 1965, the Idaho legislature was guided in its creation of the Sales Tax Act by a committee report. That report includes Section 15(b), shown below, which is today referred to as Idaho Code §63-3615(b) and cited previously.

Section 15 (b). The term "use" is here defined as broadly as possible and includes anything arising out of the legal status of ownership and

the incidence of ownership other than sale of property in the regular course of business. By this definition, the use tax in its operation applies to any dealing with property on the part of the person holding or consuming it. It is this breadth of definition that makes the use tax concomitant of the sales tax covering those areas involving transactions in tangible personal property which are not, reached by the sales tax. (House Revenue and Taxation Committee Report in Support of House Bill 222, 1965, emphasis added).

Thus, the legislature intended that should the sale of goods escape taxation, a concomitant use tax would be in place to provide an equitable treatment. Idaho Sales Tax Administrative Rules and their predecessor regulations related to real property contractors and road builders were first issued in the 1970s. In March of 1990 an issue of the State of Idaho Tax Update (Volume 2, Number One) was devoted to contractors improving real property. Road builders were featured prominently, and the text included the sentence, “If the owner of the rock has not paid tax, the contractor must pay tax on the value of the rock at the time he first handles it.” (page 3, column 2). Tax Update, published quarterly, was mailed to all sales and use tax permit holders during this time period and for a decade thereafter.

The Commission adjusted the amount due pursuant to Idaho Code §§ 63-3047 and 63-3048, and State Tax Commission Administration and Enforcement Rule 500. It then offered the taxpayer a multi-year pay agreement to settle this adjusted liability, but the taxpayer refused the offer and made no counteroffer. The taxpayer did not pay any part of the liability even though it did not offer a protest on the aspects of the audit not covered in this decision. The Commission finds the addition of interest to the taxpayer’s liability appropriate per Idaho Code § 63-3045. The Commission abated the penalty per Idaho Code 63-3047.

WHEREFORE, the Notice of Deficiency Determination dated July 24, 2002, is hereby MODIFIED, and as so modified is APPROVED, AFFIRMED and MADE FINAL.

IT IS ORDERED and THIS DOES ORDER that the taxpayer pay the following tax and interest:

<u>TAX</u>	<u>INTEREST</u>	<u>TOTAL</u>
\$78,882	\$17,174	\$96,056

DEMAND for immediate payment of the foregoing amount is hereby made and given.

An explanation of the taxpayer's right to appeal this decision is enclosed with this decision.

DATED this ____ day of _____, 2003.

IDAHO STATE TAX COMMISSION

COMMISSIONER

CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of _____, 2003, a copy of the within and foregoing DECISION was served by sending the same by United States mail, postage prepaid, in an envelope addressed to:

[REDACTED]

Receipt No.
